
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CITY OF LAS CRUCES and COUNTY
OF DOÑA ANA,

Plaintiffs,

vs.

THE TRAVELERS INDEMNITY
COMPANY, a Connecticut Corporation;
and UNITED STATES FIDELITY AND
GUARANTY COMPANY, a Maryland
Corporation, 21ST CENTURY
CENTENNIAL INSURANCE
COMPANY, a Pennsylvania Corporation,
as Successor in Interest to COLONIAL
PENN INSURANCE COMPANY, and
THE HARTFORD ACCIDENT &
INDEMNITY COMPANY, a Connecticut
Corporation,

Civil No. 2:14-CV-00931-MV-LAM

United States District Judge
Martha A. Vazquez

Magistrate Judge Lourdes A. Martinez

Defendants.

**FIRST AMENDED COMPLAINT FOR
BREACH OF CONTRACT AND DECLARATORY JUDGMENT**

Plaintiffs City of Las Cruces (“City”) and County of Doña Ana (“County”), for their
Amended Complaint for Breach of Contract and Declaratory Judgment, state:

Parties

1. Plaintiff City is a home rule municipality organized under NMSA 1978, Sections 3-15-1 *et seq.*, and is a New Mexico municipal corporation entitled to sue. *See* NMSA 1978, §§ 3-18-1.

2. Plaintiff County is a county of the State of New Mexico created under NMSA 1978, Sections 4-7-1 *et seq.*, and is a political subdivision of the State of New Mexico entitled to sue. *See* NMSA 1978, §§ 3-18-1, 4-37-1.

3. Defendant The Travelers Indemnity Company (“Travelers”) is a corporation organized and existing under the laws of the State of Connecticut and is authorized to and does transact the business of insurance in the State of New Mexico.

4. Defendant United States Fidelity and Guaranty Company (“USF&G”) is a corporation organized and existing under the laws of the State of Maryland and is authorized to and does transact the business of insurance in the State of New Mexico.

5. Defendant 21st Century Centennial Insurance Company as successor in interest to Colonial Penn Insurance Company (“21st Century”) is a corporation organized and existing under the laws of the State of Pennsylvania, and is authorized and does conduct business in the State of New Mexico.

6. Defendant Hartford Accident & Indemnity Company (“Hartford”) is a corporation organized and existing under the laws of the State of Connecticut, and is authorized to and does conduct business in the State of New Mexico.

7. The insurance companies identified in paragraphs 3 through 6 above are collectively referred to as the “Defendants”.

Jurisdiction and Venue

8. This Court has jurisdiction over this action pursuant to 28 U.S.C. Section 1332.

9. Venue is proper in this Court pursuant to 28 U.S.C. Section 1391(b).

The Policies and the Insurers

10. USF&G provided comprehensive general liability coverage to the County for covered occurrences causing property damage during policy periods from August 1, 1975 through October 1, 1984 by policy Nos. 1 CCA 22989 (1975 – 1978), 1 CCC 503 (1978 – 1981) and 1 CC 012253538 (1981 – 1984).

11. USF&G provided comprehensive general liability coverage to the City for covered occurrences causing property damage during the period July 1, 1976 through July 1, 1978 by policies numbered 1 CCA59954 and 1 CCA948243.

12. The policies identified in paragraphs 10 and 11 are collectively referred to as the “USF&G Policies”.

13. The USF&G Policies require it to indemnify the policyholder for “all sums” the policyholder “becomes legally obligated to pay as damages because of . . . property damage . . . caused by an occurrence . . .,” and to defend the policyholder against such claims.

14. Travelers provided property coverage to the City covering contaminated wells described below, namely City Well Nos. 18 and 27, for “Debris Removal” between October 1, 2011 and October 1, 2014, and, on information and belief, will renew that coverage for October 1, 2014 through October 1, 2015 by policy Nos. H-630-8957R657-IND-11, H-630-8957R657-IND-12, H-630-8957R657-IND-13, and H-630-8957R657-IND-14 (“Traveler’s Policies”).

15. The Travelers Policies, among other things, insured the City against damage to certain listed wells, including City Well Nos. 18 and 27, which were part of the City’s municipal water supply system.

16. 21st Century provided comprehensive general liability coverage to the County for covered occurrences causing property damage during policy periods from October 1, 1984 through January 1, 1987, under policy number PEC 401708 (“21st Century Policy”).

17. The 21st Century Policy requires it to pay “all sums” to which the City “becomes legally obligated to pay as damages because of.... property damage.... caused by an occurrence”, and to defend the City against such claims.

18. Hartford provided comprehensive general liability insurance coverage to the County for covered occurrences causing property damage during the policy period from July 31, 1970 through July 31, 1972 under policy number 46C412163 (“Hartford Policy”).

19. The Hartford Policy requires it to indemnify the County for “all sums” it “becomes legally obligated to pay . . . because of . . . property damage . . . caused by an occurrence,” and to defend the County against such claims.

20. The USF&G, 21st Century, Hartford and Travelers Policies described above are collectively referred to as the “Policies.”

Factual Background

21. This insurance coverage suit involves five separate locations from which releases of a hazardous substance known as perchloroethylene (“PCE”) occurred, contaminating an aquifer beneath the City and County, thus causing property damage to the aquifer and to water supply wells insured by Travelers which were part of the City’s municipal water supply system. The locations determined by governmental environmental authorities and their technical consultants to be sources of contamination included: the National Guard Armory (“Guard”), the former Crawford Municipal Airport (“Airport”), the City Fleet Maintenance Yard, the County

Maintenance Yard, and a release area at the east end of the runway at the Airport where unknown persons apparently released PCE.

22. The surface of all of the above-listed contaminant locations were owned or operated (or both) by either the City or the County.

23. The plume of PCE contamination of the affected aquifer is depicted on Figure 4 of a report prepared by Region 6 of the U.S. Environmental Protection Agency (“EPA”) entitled “Identification of PCE Release Areas in the Vicinity of Griggs and Walnut Ground Water Plume,” dated November 2003, a copy of which Figure is attached hereto as Exhibit A and incorporated by reference herein.

24. The area depicted on Exhibit A is identified as the “Griggs and Walnut Ground Water Plume Site” and is also known as the “Griggs and Walnut Superfund Site” (“Site”).

25. The City and County, as well as others, as owners or operators of the site properties, have been designated as potentially responsible parties and are required jointly and severally to remediate the PCE contamination at the Site under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (“CERCLA”), 42 U.S.C., Sections 9601 *et seq.*

26. In June 2007, EPA issued a Record of Decision (“ROD”) under CERCLA which alleged the following regarding the Site: “The total mass of PCE estimated to be affecting groundwater is between 110 and 160 kilograms (between 242 and 357 lbs.). The estimated volume is between 1,928 and 2,892 acre-feet (6.822 and 9.42 billion gallons). The approximate volume of groundwater with PCE concentrations greater than 5 µg/L [Federal drinking water standard] that will be remediated is estimated to be between 735 and 1,102 acre-feet (2.39 and

3.59 billion gallons)...The PCE plume is approximately 1.8 miles by one half miles in size based on groundwater sampling.”

27. In the ROD, EPA found that the City and County were legally obligated to pay environmental damages in the form of remediation costs.

28. The City’s and County’s liability under CERCLA is strict, retroactive, and joint and several. *See* 42 U.S.C., § 9607.

29. The groundwater impairment is “property damage” as defined in the USF&G, 21st Century and Hartford Policies.

30. In the ROD, EPA described the damages for which the City and County are liable as follows: “The Selected Remedy for the Site is Alternative 4, **Enhanced Groundwater Water Extraction with Treatment**, which is estimated to cost \$13.8 million dollars...This remedy includes treatment of ground water and hydraulic control relying upon the existing municipal supply wells to the extent possible.”

31. On October 15, 2009, EPA issued a Unilateral Administrative Order for Remedial Design (“2009 UAO”) requiring the City and County to design the infrastructure necessary to remediate the site, implement that design, and construct the remedial facility.

32. The City and County have expended funds to design and construct that infrastructure.

33. The City and County have expended many millions of dollars to remediate the Site pursuant to EPA order, and to defend against EPA’s administrative suit against them, and continue to do so.

34. The City and County are currently negotiating a final remedy for the Site with EPA, details of which have been provided to the Defendants.

35. All conditions precedent for the maintenance of this action have been met.

COUNT I – USF&G – BREACH OF CONTRACT

36. The City and County reallege and incorporate by reference the allegations of paragraphs 1 - 35 above.

37. Under the terms of the USF&G Policies, USF&G agreed to indemnify the City and County for an occurrence causing property damages during the policy period for which the City or County became legally liable, and to defend any suit against the City or County alleging such property damage claims, subject to policy terms and conditions.

38. According to governmental environmental authorities and their technical consultants, PCE contamination was occurring continuously at the Site during all of the USF&G policy periods.

39. The City and County have incurred indemnity and defense costs in response to EPA's administrative suit.

40. The City and County have itemized past costs and made timely demand for reimbursement thereof.

41. USF&G has failed and refused to reimburse these costs and thereby breached its policy obligations in that respect and others, including, but not limited to, its duty to defend and investigate.

42. Defense and indemnity costs are due and owing to the City and County in amounts to be proven at trial.

43. USF&G is liable to the City and the County, respectively, for those defense and indemnity costs.

44. By virtue of its breaches of policy obligations, USF&G is prohibited from relying upon policy limits or other policy defenses in the defense of the City's and County's claims.

45. USF&G is barred from denying coverage for the City's and County's claims by the doctrines of waiver and estoppel.

46. USF&G has unreasonably failed to pay the claims of the City and County and the City and County are entitled to an award of reasonable attorney's fees and costs under NMSA 1978, Section 39-2-1.

COUNT II – TRAVELERS – BREACH OF CONTRACT

47. The City and County reallege and incorporate by reference the allegations of paragraphs 1 – 46 above.

48. The Travelers Policies provide "Additional Benefits" to the City in the form of coverage for "Debris Removal."

49. Travelers' insuring agreement for "Debris Removal" under its 2011 and 2013 policies provides in pertinent part:

a. Debris Removal

- i. We will pay your expense to remove debris of Covered Property caused by or resulting from a Covered Cause of Loss that occurs during the policy period. The expenses will be paid only if they are reported to us in writing within 180 days of the date of direct physical loss or damage.

This Additional Coverage does not apply to:

1. Costs to extract "pollutants" from land or water; or
2. Costs to remove, restore or replace polluted land or water.

50. Travelers' insuring agreement for "Debris Removal" under its 2012 policy provides in pertinent part:

a. Debris Removal

- i. We will pay your expense to remove debris of Covered Property, and other debris that is on the described premises, when such debris is caused by or results from a Covered Cause of Loss that occurs during the policy period. The expenses will be paid only if they are reported to us in writing within 180 days of the date of direct physical loss or damage.

This Additional Coverage does not apply to costs to:

- (a) Remove debris of property you own that is not insured under this policy, or property of others in your care custody or control that is not Covered Property;
- (b) Remove debris of property owned by or leased to the landlord of the building where your described premises are located, unless you have a contractual responsibility to insure such property and it is insured under this policy.

51. Pollutants or contaminants in excess of Maximum Contaminant Limitations (“MCL’s”) imposed under Federal drinking water standards are considered “Debris” within the meaning of such a clause and courts so held prior to the issuance of the Travelers Policies.

52. Based upon the wording of policies issued to the City by Travelers and affiliated companies, including, but not limited to, other “Debris Removal” policy forms, the City had a reasonable expectation of coverage for the cost of testing and monitoring for pollutants.

53. The cost of testing or monitoring for pollutants is not excluded from the “Debris Removal” coverage of the Travelers Policies.

54. City Well Nos. 18 and 27, shown on Exhibit A, are owned by the City, are part of the City’s municipal water supply system, and are separately-listed covered locations under the Travelers Policies.

55. City Well Nos. 18 and 27 have been contaminated by PCE in excess of applicable MCL’s, and that contamination continued throughout the policy periods of the Travelers Policies.

56. The City and County have expended significant sums for testing and monitoring of debris, namely PCE at City Well Nos. 18 and 27 to assure compliance with MCL's.

57. The City timely reported losses to Travelers in the form of expenditures for covered "Debris Removal" and demanded reimbursement.

58. Subsequent to receipt of the City's reports, Travelers nonetheless issued the Travelers Policies.

59. Travelers has wrongfully breached its policy obligations by failing and refusing to reimburse the City's losses for covered "Debris Removal" up to policy limits.

60. By virtue of that breach, Travelers is not allowed to rely upon policy limits or other policy defenses in the defense of the City's claims.

61. Travelers is barred from denying coverage for the City's claims by the doctrines of waiver and estoppel.

62. Travelers is liable for the City's pollutant testing and monitoring costs concerning City Well Nos. 18 and 27 in amounts to be proved at trial.

COUNT III – 21st CENTURY BREACH OF CONTRACT

63. The City and County reallege and incorporate by reference the allegations of paragraphs 1 - 62 above.

64. Under the terms of the 21st Century Policy, 21st Century agreed to indemnify the County for any occurrence causing property damages during the policy period for which the County became legally liable, and to defend any suit against the County alleging such property damage claims, subject to policy terms and conditions.

65. According to governmental environmental authorities and their technical consultants, PCE contamination was occurring continuously at the Site during all of the 21st Century policy periods.

66. The County has incurred indemnity and defense costs in response to EPA's administrative suit.

67. The County has itemized past costs and made timely demand for reimbursement thereof.

68. 21st Century has failed and refused to reimburse these costs and thereby breached its policy obligations in that respect and others, including, but not limited to, its duty to defend and investigate.

69. Defense and indemnity costs are due and owing to the County in amounts to be proved at trial.

70. 21st Century is liable to the County for those defense and indemnity costs.

71. By virtue of its breaches of policy obligations, 21st Century is prohibited from reliance upon policy limits or other policy defenses in the defense of the County's claims.

72. 21st Century is barred from denying coverage for the County's claims by the doctrines of waiver and estoppel.

73. 21st Century has unreasonably failed to pay the claims of the County and the County is entitled to an award of reasonable attorney's fees and costs under NMSA 1978, Section 39-2-1.

COUNT IV –HARTFORD– BREACH OF CONTRACT

74. The City and County reallege and incorporate by reference the allegations of paragraphs 1 - 73 above.

75. Under the terms of the Hartford Policy, Hartford agreed to indemnify the County for any occurrence causing property damages during the policy period for which the County became legally liable, and to defend any suit against the City or the County alleging such property damage claims, subject to policy terms and conditions.

76. According to governmental environmental authorities and their technical consultants, PCE contamination was occurring continuously at the Site during all of the Hartford policy periods.

77. The County has incurred indemnity and defense costs in response to EPA's administrative suit.

78. The County has itemized past costs and made timely demand for reimbursement thereof.

79. Hartford has failed and refused to reimburse these costs and thereby breached its policy obligations in that respect and others, including, but not limited to, its duty to defend and investigate.

80. Defense and indemnity costs are due and owing to the County in amounts to be proved at trial.

81. Hartford is liable to the County for those defense and indemnity costs.

82. By virtue of its breaches of policy obligations, Hartford is prohibited from reliance upon policy limits or other policy defenses in the defense of the County's claims.

83. Hartford is barred from denying coverage for the County's claims by the doctrines of waiver and estoppel.

84. Hartford has unreasonably failed to pay the claims of the County and the County is entitled to an award of reasonable attorney's fees and costs under NMSA 1978, Section 39-2-1.

**COUNT V – USF&G, 21ST CENTURY, HARTFORD AND
TRAVELERS – DECLARATORY JUDGMENT**

85. The City and County reallege and incorporate by reference the allegations of paragraphs 1-84 above.

86. The USF&G, 21st Century, Hartford and Travelers Policies cover the City's and/or County's respective losses, both present and future.

87. USF&G, as to the City and County, and 21st Century, Hartford (as to the County only) have a duty to defend and indemnify the City and/or County, respectively, with respect to the administrative suit of EPA as described above, and Travelers has a duty to reimburse the City for well testing and monitoring expenses.

88. The City and County have received administrative notices and determinations that they are responsible to remediate the Site.

89. As a result of EPA directives, orders and claims, the City and County have expended, and will continue to make expenditures, in remediation and associated costs and expenses.

90. Although the City and County tendered the defense and indemnity of their claims to USF&G, 21st Century and Hartford each of these insurers has wrongfully refused to defend and indemnify the City and County.

91. USF&G, 21st Century, Hartford and Travelers are or may be liable to the City and County for all or a portion of EPA's claims against them, as well as the cost of testing and monitoring City Well Nos. 18 and 27.

92. An actual controversy exists as between the City and County and USF&G, 21st Century and Hartford with respect to the issues of these Insurers' respective duties to defend and

indemnify the City and County with respect to the claims of EPA; and as between the City and Travelers with respect to Travelers' duties to defray costs of testing and monitoring of City Well Nos. 18 and 27.

93. The City and County are entitled to a declaratory judgment, pursuant to the New Mexico Declaratory Judgment Act, NMSA 1978, Sections 44-6-1 *et seq.* and Rule 1-057 NMRA, that USF&G is obligated to defend and indemnify the City and County, and 21st Century and Hartford are obligated to defend and indemnify the County, with respect to those claims, and that Travelers is obligated to reimburse well testing and monitoring expenses.

94. The City and County are also entitled to a declaratory judgment adjudicating and apportioning the respective responsibilities of the Defendants as regards the claims of the City and County.

95. Because future covered costs will continue over a period of years, supplemental relief under NMSA 1978, Section 44-6-9 will be required.

WHEREFORE, the City and County request the following relief:

1. As to Count I, judgment against USF&G in an amount to be proven at trial, with pre- and post-judgment interest on that amount as allowed by law.
2. As to Count II, judgment against Travelers in an amount to be proven at trial, with pre- and post-judgment interest on that amount as allowed by law.
3. As to Count III, judgment against 21st Century is an amount to be proven at trial, with pre- and post-judgment interest thereon as allowed by law.
4. As to Count IV, judgment against Hartford in an amount to be proven at trial, with pre- and post-judgment interest thereon as allowed by law.

5. A declaratory judgment determining and adjudging the respective responsibilities of Defendants for the City's and County's losses, as well as a declaration that USF&G is obligated to defend and indemnify the City and County, and 21st Century and Hartford are obligated to defend and indemnify the County, against EPA's claims, and that Travelers is obligated to reimburse well testing and monitoring expenses.

6. If appropriate, supplemental relief under NMSA 1978, Section 44-6-9.

7. Costs and attorney fees as may be otherwise allowed by law, together with such other and further relief in the City's and County's favor that the Court deems just and proper.

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